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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL LOUIS PACHECO, JR., et al., Defendants and Appellants.	B213786 (Los Angeles County Super. Ct. No. GA066509)

APPEAL from the judgment of the Superior Court of Los Angeles County. Teri Schwartz, Judge. Affirmed as to Michael Louis Pacheco, Jr. Affirmed as modified as to Michael Louis Pacheco, Sr.

Julie Schumer, under appointment by the Court of Appeal, for Defendant and Appellant Michael Louis Pacheco, Jr.

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant and Appellant Michael Louis Pacheco, Sr.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan Sullivan Pithey and Catherine Okawa Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants and appellants Michael Louis Pacheco, Sr. (Pacheco) and Michael Louis Pacheco, Jr. (Junior)[1] were charged with first degree murder pursuant to Penal Code section 187, subdivision (a) arising from the death of Raymond Gonzalez (Gonzalez). Pacheco and Junior were convicted by jury of the lesser included offense of voluntary manslaughter. Junior raises four issues on appeal. In two related arguments, he contends there was insufficient evidence to support his conviction for voluntary manslaughter as an aider and abettor and that, given the state of the evidence, the use of CALCRIM No. 403 constituted error. Junior also contends he was unduly prejudiced by the admission of testimony that his father, Pacheco, was on parole. Finally, he argues there was prejudicial juror misconduct arising from disclosure of outside information that tainted the entire jury. Pacheco joins in the third and fourth arguments. Additionally, respondent requests correction of a clerical error in the abstract of judgment pertaining to Pacheco's conviction. We direct the trial court to modify the abstract of judgment but otherwise affirm the judgments as to both defendants in all respects.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Stabbing of July 27, 2006

Ernest Vasquez (Vasquez) lived on Angelus[2] Avenue in Rosemead. He knew Gonzalez who had done some plumbing for him. He also knew Pacheco and his son, Junior, sometimes called "Mikey," because they frequently hung out in the neighborhood. Vasquez described Gonzalez as a "bully" who liked to "box" or fight people and Vasquez had seen him with a knife before. He had also seen Pacheco carrying a knife. Gonzalez was physically bigger than Pacheco.

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[1] Because of the common surname, we will maintain the usage in the record of referring to the younger Michael as "Junior" despite the informality. Where appropriate, Pacheco and Junior will also be collectively referred to herein as "defendants."

[2] We use the correct spelling of the street name which was erroneously spelled in the record as "Angeles."

On the afternoon of July 27, 2006, there was a street fight near the front of Vasquez's home, approximately one to two houses down. Vasquez did not see how it started. He was approximately 35 feet or more away from the fight, looking out his kitchen window which is at the front corner of his house. There were some bushes or chain link fencing partially blocking his view, but his kitchen area is raised a little from street level so he could see over most of the bushes. From the window, Vasquez saw Gonzalez and Pacheco "struggling" or what appeared to be fighting. Junior was also involved. Vasquez saw Pacheco stab Gonzalez, who was on the ground, while Junior kicked him. He only saw the fight for about five to seven seconds.

After the stabbing, the fight ended and Vasquez watched the three men leave in three different directions. Junior walked toward Vasquez's house. Gonzalez, "full of blood" and holding his face or neck, walked quickly to his truck and drove away.[3] Pacheco walked in the opposite direction from Gonzalez. Vasquez had no idea what the fight was about. At the time, Vasquez was in a lot of pain himself and on prescription pain medications due to a severe leg injury he had suffered in a car accident. He also may have had a few beers that day as well as illegal drugs. At some point before the sheriffs arrived on the scene, Junior came inside Vasquez's house.

Arlene R. lived a couple of doors down from Vasquez with her minor son, Nathan R. She did not see the fight, but she knew of Gonzalez since he visited the neighborhood occasionally. She would sometimes see him at Vasquez's house, which she believed was known as a place to buy drugs.[4] She saw Gonzalez arrive the day of the incident in his truck and park it across the street. Around that time, she had planned to

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[3] Gonzalez only drove a few blocks away, where he pulled into an auto repair shop, asked a patron to call 911 and collapsed a few minutes later.

[4] Deputy Wright corroborated that Vasquez's house was known by police as a location where illegal drugs were sold. He also testified that Gonzalez's father, who was contacted after the incident as the registered owner of the truck, took the deputies to Angelus Avenue as a location that Gonzalez frequented to purchase heroin, and that was how the crime scene was located.

walk to the store with her son and a friend, Jessica Cruz. However, Arlene had a blister on her foot so she went inside to get a Band-Aid.® Nathan remained in the front yard with Cruz. They never went to the store because when Arlene came back out about 15 minutes later, she noticed a lot of neighbors were out in the street. Arlene was not sure what was going on, but she believed there may have been a fight, and she wanted to get her son back inside to safety.

Later in the afternoon that same day, Sophia Pacheco (Pacheco's daughter), was called to come to her aunt's house. She arrived there after work, and her father was already there. He had two cuts on his upper right arm that were bleeding. He had medical supplies with him. Pacheco told her that some bully had tried to kill him. He never told her that Junior was involved in the incident. She cleaned up the wounds and put some butterfly bandages on them and told her father to go to the doctor. She never spoke to a police officer about her father's injuries.

Deputy Shawnee Valdivia[5] of the Los Angeles County Sheriff's Department was the first officer at the crime scene on Angelus Avenue, along with Deputy Nakauchi. She observed a blood trail in the street, as well as a drug pipe and a pair of black flip-flop sandals. She was familiar with Vasquez and knew he lived on the street. After other deputies who had arrived on the scene made an inquiry at his home, Vasquez came outside and spoke with Valdivia. He told her he had not heard or seen anything. Vasquez appeared disheveled, but she did not believe he was under the influence of anything at that time. The deputies told Vasquez to sit on the curb and after about 45 minutes, he was transported to the station for questioning.

Various deputies, including Deputy Valdivia, were aware there were other people inside Vasquez's home. Vasquez told the deputies there were other people in his house, and the deputies could see them looking out a window. The deputies spoke to the people inside through the window and over the loud speaker in a police vehicle, asking them to come out and talk to them. After approximately three hours, five people, including

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5 At the time of trial, Deputy Valdivia had married and her surname was Hinchman.

Junior, finally came out of the house. Junior and the other potential witnesses were then transported to the sheriff's station to be interviewed.

Detective Steven Lankford (Lankford), a deputy sheriff for 25 years, and his partner Jeff Cochran were the homicide detectives assigned to investigate the death of Gonzalez. At the scene, Lankford saw a trail of blood indicating the direction Gonzalez probably took leaving the fight and getting into his truck, consistent with the initial witness statements he had taken. In looking at Gonzalez's truck, he noticed it was missing an ignition, meaning it would have had to have been started with another tool like a screwdriver, scissors or a knife.

Lankford interviewed various witnesses that day, including Vasquez. When Lankford first spoke to Vasquez, he said he had not seen anything. A couple of hours later however, Vasquez asked to speak with Lankford again. During the second interview, Vasquez told Lankford he had seen the end of the fight, including the stabbing, and that Pacheco and Junior had come back to his house after the fight and cleaned up. Both interviews were tape-recorded.

2. The Trial

It was undisputed at trial that Gonzalez died from a fatal stab wound. The prosecution presented Yulai Wang, deputy medical examiner, who testified the cause of death was homicide due to a stab wound to the chest. He also testified that Gonzalez had methamphetamine and morphine in his system at the time of his death,[6] a large facial wound, abrasions on his knees, the tops of his toes and the palm of his right hand, as well as a cut to the little finger on that hand. He opined the chest wound was front to back with a slightly downward trajectory. Wang therefore assumed Gonzalez was upright, at least partially, when stabbed, but he could not say for sure if he was standing, kneeling or lying down when the fatal wound was delivered. He admitted that Gonzalez's face wound was consistent in appearance with being either an intentional slashing or an

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6 Toxicologist Daniel Anderson corroborated that Gonzalez had various drugs in his system at the time of his death.

accident caused by two persons struggling with the same knife during a fight. Wang also confirmed Gonzalez did not have any defensive knife wounds.[7]

Maria Luera, Gonzalez's girlfriend for over nine years, confirmed he was a heroin addict who had been clean, but had relapsed and had left that morning to go buy heroin. Yvette Luera, Maria's daughter, corroborated her mother's testimony that Gonzalez had a heroin problem. However, she denied ever telling a former roommate, Catrina Balderrama (Balderrama), that Gonzalez was violent or abusive when under the influence of alcohol or heroin.

During his trial testimony, Vasquez admitted to a lifelong addiction to drugs and alcohol and to having a "real bad memory."[8] Vasquez also admitted he occasionally sold heroin out of his house and had used heroin in the past with both Pacheco and Gonzalez. He recalled one time Gonzalez had been "aggressive" with him, yelled at him, and got "kind of crazy" over drugs. Vasquez also said his second interview with Detective Lankford following the incident was accurate and was in fact the truth and that he initially said he did not see anything because he did not want to get involved and have to testify. He admitted to feeling intimidated by people in the neighborhood about testifying. Copies of the transcripts of both of the Vasquez interviews were read to the jury and admitted into evidence as exhibit numbers 16 and 18.

Detective Lankford acknowledged that Vasquez gave different versions of what happened on July 27, 2006. However, he explained that, in his experience, witnesses often are reluctant to talk to the police and do not initially provide all information known to them. He said Vasquez seemed sober and coherent during his second interview when he described the stabbing, but was complaining that he was in pain due to his leg injury.

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[7] Blood samples were collected from Gonzalez's truck and from the street where the fight occurred.

[8] Dr. Ronald Markman, a forensic psychiatrist, testified for the defense and opined that chronic drug use can cause memory problems and/or "blackouts."

In lieu of calling Arlene's minor son Nathan to the stand, the prosecution entered into an agreement with his father, Keith G., who had custody of the child at the time of trial. Keith had been separated from Arlene for a number of years but still was in contact with her because of their son. He agreed to testify in order to avoid having his son put on the witness stand. Keith testified Arlene had told him a couple of times about witnessing the stabbing on July 27, 2006. He said that Arlene told him after testifying at trial that she had denied seeing anything at all.

Balderrama testified on behalf of the defense and admitted she had a daughter with David Pacheco, one of Pacheco's other sons. She contradicted Yvette Luera's testimony. She said Yvette had told her Gonzalez was mean and violent when he was using heroin and that she needed a new place to live. Balderrama had offered Yvette a room in her apartment as a favor to a mutual friend. Shortly after moving in, Yvette moved out and left some of her things behind. Balderrama testified that Junior was outside her apartment several days before the incident when Gonzalez was also there, apparently threatening Balderrama to return Yvette's property.

Patrick Little, a defense investigator, testified he took a witness statement from Vasquez and that Vasquez denied seeing anything and that he had made up the story in his second interview with Detective Lankford because he wanted to go home. Little also testified to having spoken with Arlene who denied ever having any conversation with Keith about what she did or did not witness on the day of the stabbing.

Pacheco testified in his own defense. Junior did not. Pacheco testified he had known Vasquez for several years. He had stayed overnight at his home on occasion and had in fact stayed over on the night before the incident. Pacheco also testified he knew Gonzalez and had not had any problems with him in the past. However, he knew Gonzalez was known by the nickname "Maton" which means "Killer" and that he had seen him be aggressive with people, including Vasquez. Pacheco stated he saw Gonzalez slap Vasquez around over drugs on at least two occasions and also saw him do the same to a female.

Around 2:00 p.m. on July 27, 2006, Pacheco was in the rear yard of Vasquez's house when Richard Franco, Jr., came into the yard and told him he should go out front because Gonzalez was in some sort of confrontation with his son Junior. Pacheco admitted he was smoking marijuana and drinking alcohol at the time. When he went around front, he saw Gonzalez striking his son and ran over to intervene. He did not notice any weapon. Pacheco got in between the two of them and then he and Gonzalez engaged in a "fistfight." He said that once he stepped in, Junior was no longer involved. Both he and Gonzalez threw a lot of punches in "quick succession" but he could not recall exactly how many or how long the fight lasted. Pacheco denied that Junior kicked Gonzalez during the fight.

At some point, Pacheco realized that Gonzalez pulled out a knife. He grabbed Gonzalez's wrists and they began wrestling over the knife, dropping down to their knees in the ensuing struggle. They also ended up rolling around on the ground during a portion of the fight. Gonzalez was saying to Pacheco that he was going to "stick" him and was trying to shove the knife up under his chin toward his neck. During the back and forth struggle with the knife, Pacheco recalled the knife cutting Gonzalez on his face. He admitted he attempted to shove the knife toward Gonzalez's body several times which he felt he had to do in order to survive. Pacheco said he eventually got the upper part of the knife under control and believed Gonzalez still had his hands on the lower portion—presumably the blade. Pacheco shoved the knife hard against Gonzalez's body and Gonzalez said "[ya estuvo]" which means roughly "that's it." Gonzalez got up from the ground where they had been struggling and said,"This ain't over." Gonzalez walked in one direction down the street and Pacheco walked away in the other direction, but he did not go back to Vasquez's house, despite having left his wallet in the kitchen area of Vasquez's house.[9]

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[9] Richard Franco, Sr., who had testified at the preliminary hearing, had passed away by the time of trial and portions of his prior testimony were read into the record. He stated that in July 2006 he was staying at Vasquez's home and that on the day of the incident he noticed Pacheco's wallet and cell phone in the house and took them for

As he walked away, Pacheco testified he realized immediately he had been cut by the knife since he was bleeding, but he was "happy to be alive." He had been angry with Gonzalez during the fight, but after the conclusion he said he just wanted to get out of the area. Pacheco testified he did not see Gonzalez leave in his truck. He only saw him walking away down the street. He also saw his son Junior standing in the crowd of people by Vasquez's house as he walked away from the altercation. Junior asked him what was happening and Pacheco told him everything was going to be all right.

Pacheco admitted he knew a lot of people on Angelus Avenue, but he did not stop at any of those houses to seek medical treatment for his cuts. Instead, Pacheco said he walked to the house of a family member nearby and had them call his daughter Sophia. He waited for her to come by after work and she then assisted him with cleaning and bandaging the cuts on his upper arm. In addition to being cut on his right arm, Pacheco said he received some other abrasions from having fought with Gonzalez in the street. His daughter wanted him to seek treatment at a hospital but he did not go because he did not think it was that serious.

Pacheco admitted that after the incident he moved around a lot, staying with different family members. He denied that he was hiding from the police, but rather just wanted to "spend time with [his] family." He admitted that when Junior was arrested for murder as a result of the incident, almost a month elapsed until he was arrested but during that month he never went to the sheriff's station or told anyone what happened or that Junior did not do anything wrong. During that month, Pacheco instead sought money from family to pay for a lawyer for himself and Junior. When he was being booked after his arrest, he showed the cuts on his arm to the police who may have taken photographs. The cuts were mostly healed at that point since it was several months later.

After the conclusion of evidence, while the jury was deliberating, the jury forwarded a note to the judge indicating a concern raised by Juror No. 9. The note

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"safekeeping." He denied seeing either Gonzalez or Pacheco that day and denied seeing any portion of the fight.

indicated Juror No. 9 had noticed, during the last days of testimony, a female spectator sitting on the defense side of the courtroom with whom she had gone to high school. The spectator may have been a friend of defense witness Balderrama. Juror No. 9 shared her concerns with the other jurors about knowing a person potentially associated with the case and also her concern that the woman likely knew her address or that she might run into her in the neighborhood.

The court, in the presence of all counsel, questioned each juror individually about exactly what had been disclosed to them and all the jurors indicated that it consisted only of Juror No. 9's belief that she may have gone to high school with a female spectator that was seated on the defense side of the courtroom and that she was concerned she knew where she lived. Those jurors, including Juror No. 9, who were expressly asked if this information would affect their deliberations all unequivocally answered "no."[10]

The following morning the parties argued the defense motions for mistrial which were denied, the court finding no juror misconduct. Juror No. 3 then sent a note to the judge requesting a private discussion. Juror No. 3 told the court, with only counsel present, that overnight he thought about whether or not there were safety concerns to him and his family in delivering a verdict and expressed his belief that he no longer felt capable of discharging his duties as a juror. He stated he had not discussed his concerns with any other members of the jury. Juror No. 3 was discharged and replaced, by random draw, with Alternate Juror No. 4. The jury was then instructed to start their deliberations anew and they returned a verdict the next court day.

3. The Verdict and Sentencing

The jury convicted Pacheco and Junior of the lesser included charge of voluntary manslaughter and also found true the personal use of a knife allegation as to Pacheco. Pacheco was sentenced to the upper term of 11 years plus an additional year on the enhancement, with 969 days of custody credits, and various fines and restitution imposed.

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10 The record does not reveal whether or not the question was directly asked of Jurors Nos. 1, 4 and 5.

Junior was sentenced to the middle term of six years, with 1049 days of custody credits, and various fines and restitution. This appeal followed.

DISCUSSION

Junior contends his conviction for voluntary manslaughter as an aider and abettor is not supported by substantial evidence and that, given the state of the evidence, the jury was misinstructed with CALCRIM No. 403 on the natural and probable consequences doctrine. Junior, joined by Pacheco, also argues there was an impermissible and prejudicial admission of testimony that Pacheco was on parole and that there was jury misconduct arising from consideration of information extraneous to the record. As we explain below, we reject all four contentions and affirm the convictions of both defendants. However, we agree with respondent that the abstract of judgment as to Pacheco's conviction contains a clerical error that must be corrected.

1. Junior's conviction for voluntary manslaughter as an aider and abettor is supported by substantial evidence.

Junior contends there is no evidence he engaged in any acts that aided and abetted Pacheco, nor any evidence he had knowledge or shared intent to use a knife against Gonzalez resulting in death. We disagree.

" 'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]' " (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; accord, *People v. Staten* (2000) 24 Cal.4th 434, 460 ["critical inquiry" is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt].) We must confirm that the evidence supporting the verdict is "reasonable, credible, and of solid value," but refrain from reweighing the evidence and substituting our evaluation of the credibility of witnesses for that of the trier of fact. (*People v. Ochoa*, *supra*, at p. 1206.) This same standard applies whether the evidence is direct or circumstantial. (*People v.*

Prince (2007) 40 Cal.4th 1179, 1251.) Under this deferential standard of review, the record supports Junior's conviction for voluntary manslaughter as an aider and abettor.

In addition to its primary theory of guilt based on murder with Pacheco identified as the principal and Junior the aider and abettor, the prosecution also argued for an alternative theory of guilt under the natural and probable consequences doctrine. The alternative theory was that defendants committed the uncharged target offense of assault with a deadly weapon that resulted in a reasonably foreseeable death. Under California law, aider and abettor liability includes the potential for liability under the "natural and probable consequences" doctrine. (*People v. Prettyman* (1996) 14 Cal.4th 248, 261; *People v. Beeman* (1984) 35 Cal.3d 547, 560; see also Pen. Code, § 31.) "[A] defendant may be held criminally responsible as an accomplice not only for the crime he or she intended to aid and abet (the target crime), but also for any other crime that is the 'natural and probable consequence' of the target crime." (*People v. Prettyman, supra,* at p. 261.)

There is sufficient evidence in the record to support a finding by the jury that Junior aided and abetted the target crime of assault with a deadly weapon for which the death of Gonzalez was reasonably foreseeable. Vasquez provided eyewitness testimony of the material portion of the fight. He saw Pacheco and Gonzalez fighting with Junior nearby. He then saw Pacheco stab Gonzalez with a knife, while Junior kicked him. The testimony of a single witness, if believed, is sufficient to establish an essential element or material fact. (6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Appeal, § 150, p. 397; Evid. Code, § 411.) The "uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable." (*People v. Scott* (1978) 21 Cal.3d 284, 296; *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.) This is so even if that testimony "is contradicted by other evidence, [is] inconsistent or false as to other portions." (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 366.)

While Vasquez's testimony established modest participation by Junior in the physical acts that ultimately resulted in Gonzalez's death, "[t]he 'act' required for aiding and abetting liability need not be a substantial factor in the offense. ' "Liability attaches

to anyone 'concerned,' however slight such concern may be, for the law establishes no degree of the concern required to fix liability as a principal." [Citation.]' [Citation.] 'It has been held, therefore, that one who is present for the purpose of diverting suspicion, or to serve as a lookout, or to give warning of anyone seeking to interfere, or to take charge of an automobile and to keep the engine running, or to drive the "getaway" car and to give direct aid to others in making their escape from the scene of the crime, is a principal in the crime committed. [Citations.]' [Citation.]" (*People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733, 743-744.)

Moreover, there was circumstantial evidence supporting Vasquez's eyewitness testimony. Circumstantial evidence may properly be relied upon to the same extent as direct evidence to prove or disprove the elements of a crime. (*People v. Morrow* (1882) 60 Cal. 142, 145-146; CALCRIM No. 223.) "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the . . . jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." (*People v. Maury* (2003) 30 Cal.4th 342, 403.)

Yulai Wang, the medical examiner, testified the characteristics of the stab wounds were consistent with the version of the fight as explained by Vasquez, including the slightly downward trajectory of the fatal stab wound. He also attested to the fact Gonzalez had abrasions on the tops of his toes and his knees—a fact which supports a reasonable inference Gonzalez was down on his knees and/or otherwise on the ground with Pacheco over him at the moment he was stabbed, as Vasquez described. There was a blood trail leading toward Gonzalez's truck, and Gonzalez suffered a facial wound; both facts being consistent with Vasquez's testimony that he saw Gonzalez, covered in blood, and holding his face or neck as he made his way to his truck after being stabbed. Pacheco's conduct after the fight, including moving around from house to house, raised a reasonable inference of consciousness of guilt. Likewise, the testimony that Junior refused to come out of Vasquez's house for several hours to speak to the deputies supports an inference of consciousness of guilt. Balderrama attested to a possible motive

for the initiation of the confrontation between Junior and Gonzalez based on the incident at her apartment a few days earlier concerning Yvette Luera, where Junior witnessed Gonzalez threatening Balderrama—a woman who had a child with one of Junior's brothers.[11]

Not only does the circumstantial evidence support Vasquez's version of events, it is also precisely the type of evidence appropriately considered in determining accomplice liability. " 'Among the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense.' " (*People v. Chagolla* (1983) 144 Cal.App.3d 422, 429; accord, *People v. Campbell* (1994) 25 Cal.App.4th 402, 409.) There was sufficient evidence showing Junior's presence at the crime, assisting his father in attacking Gonzalez or otherwise making it difficult for Gonzalez to defend himself against the assault, and cleaning his clothes and avoiding contact with law enforcement subsequent to the fight.

Junior argues that even assuming Vasquez's testimony that he kicked Gonzalez while his father stabbed him is credited, there is no evidence he shared any knowledge concerning the use of a weapon nor was it objectively reasonable for the jury to conclude that an ordinary fistfight would escalate into a deadly confrontation. The record, viewed through the lens of applicable law, suggests otherwise. On the issue of shared intent, the Supreme Court has explained that "*proof* of the aider and abettor's intent may be made *by way of an inference from* [*his or*] *her volitional acts* with knowledge of their probable consequences." (*People v. Beeman*, *supra*, 35 Cal.3d at pp. 559-560, italics added.) This is so because "[d]irect evidence of the mental state of the accused is rarely available . . . ." (*Id*. at p. 558.) "Thus, an act which has the effect of giving aid and encouragement, and which is done with knowledge of the criminal purpose of the person

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11 The evidence that Gonzalez was a bully and a drug addict was not inconsistent with the version of the fight presented by Vasquez and accepted by the jury. No witness supported the self-defense version of the fight as attested to by Pacheco. Defendants argued self-defense and defense of others and the trial court did instruct on those theories.

aided, may indicate that the actor intended to assist in fulfillment of the known criminal purpose." (*Id*. at p. 559.)

More importantly, advance knowledge of the intended crime is not necessary to establish the requisite intent for aiding and abetting liability. "A person may aid and abet a criminal offense without having agreed to do so prior to the act. [Citations.] In fact, it is not necessary that the primary actor expressly communicate his criminal purpose to the defendant since that purpose may be apparent from the circumstances. [Citations.] *Aiding and abetting may be committed 'on the spur of the moment,' that is, as instantaneously as the criminal act itself.* [Citation.] . . . [Citations.] . . . [I]n determining whether a collateral criminal offense was reasonably foreseeable to a participant in a criminal endeavor, consideration is not restricted to the circumstances prevailing prior to or at the commencement of the endeavor, but must include all of the circumstances leading up to the last act by which the participant directly or indirectly aided or encouraged the principal actor in the commission of the crime." (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531-532, italics added; accord, *People v. Montoya* (1994) 7 Cal.4th 1027; *People v. Swanson-Birabent*, *supra*, 114 Cal.App.4th at p. 742.)

The direct testimony of Vasquez, the circumstantial evidence, and reasonable inferences arising therefrom all support the jury's finding that Junior had the requisite intent to aid and abet an assault on Gonzalez and that the resulting death of Gonzalez was reasonably foreseeable. The determination of a reasonably foreseeable consequence is judged from an objective standard and not whether the defendant subjectively foresaw the actual outcome of the target crime he or she assisted. The resulting crime, in this instance the homicide, need not have " ' "been a strong probability; a possible consequence which might reasonably have been contemplated is enough. . . ." [Citation.]' [Citation.] A reasonably foreseeable consequence is to be evaluated under all the factual circumstances of the individual case [citation] and is a factual issue to be resolved by the jury." (*People v. Medina* (2009) 46 Cal.4th 913, 920.) From the record, it is reasonable to infer that if Vasquez could see, from the window of his home, Pacheco stabbing Gonzalez, that Junior, standing in physical proximity to the fight and participating in it,

was not oblivious to the fact his father had escalated the fight into a potentially deadly confrontation. A reasonable inference is that he chose, on the spur of the moment, to continue to assist his father despite the sudden escalation of the nature of the fight, ignoring the possibility that the fight could reasonably result in death.

We are not unmindful of the point raised by Junior that a significant number of the cases finding it reasonably foreseeable that an "ordinary" fight can escalate to murder involve gang confrontations. (See, e.g., *People v. Medina*, *supra*, 46 Cal.4th 913; *People v. Montes* (1999) 74 Cal.App.4th 1050, 1056 [in modern gang warfare "verbal taunting can quickly give way to physical violence and gunfire"].) When gangs are involved, reviewing courts often find no difficulty in affirming convictions against unarmed gang members found guilty as aiders and abettors even without evidence of specific knowledge that weapons would be introduced into the fight. However, those cases do not stand for the proposition that it is per se unreasonable for a factfinder to impose similar liability when nongang members are involved.

Junior's reliance on *People v. Butts* (1965) 236 Cal.App.2d 817 in this regard is misplaced. The outcome in *Butts* was the result of the specific nature of the fights involved there and not simply because the case was not a traditional gang case. *Butts* concerned nongang members (Otwell and Butts) who became embroiled in verbal taunting and challenges to engage in a fight with another group of young men. (*Id*. at pp. 823-824.) "Two separate skirmishes" erupted, one involving Otwell and several men and another fight, some 45 to 100 feet away, involving Butts and two opponents. (*Id*. at p. 824.) There was evidence Butts was intoxicated. (*Id*. at p. 825.) There was no evidence that Butts knew Otwell had a knife or in any way participated in, assisted or encouraged Otwell in his knife fight—rather, Butts was "thoroughly absorbed" in defending himself against his two opponents at least 45 feet away. (*Id*. at pp. 836-837.) On such facts, the court found Butts could not be held to have had any shared intent or knowledge of Otwell's criminal purpose to engage in a knife fight, as opposed to a mere fistfight. (*Id*. at p. 837.) There is no similarity to the facts of this case which involved an

intimate attack by Pacheco and Junior in close proximity to one another against one victim.

When faced with a request to find a conviction wanting for lack of substantial evidence, we must remain ever mindful of our standard of review. "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." (*People v. Farnam* (2002) 28 Cal.4th 107, 143; *People v. Holt* (1997) 15 Cal.4th 619, 668.) Where a substantial evidence argument is just a guise for disregarding the credibility determinations of the factfinder, it must be rejected. The jury came to a conclusion as to what version of the incident was accurate, judging the credibility and respective motivation for bias of each witness, and ultimately accepting the eyewitness testimony of Vasquez. His testimony, as embodied in the second interview he gave to Detective Lankford within hours of the incident, cannot be deemed inherently impossible or improbable. There is nothing in the record that establishes it was physically impossible for Vasquez to have witnessed the fight as he described it from his front window. Therefore, we cannot say there is insufficient evidence merely because a different jury may have also reasonably resolved the credibility issues of the various witnesses more favorably to Junior, including crediting his father's testimony that he acted only in defense of Junior and himself.

2. The trial court properly instructed the jury with CALCRIM No. 403 regarding the "natural and probable consequences" doctrine.

Junior next argues there was no evidentiary basis to support the giving of CALCRIM No. 403. Junior does not raise a traditional instructional error argument based on purported legal infirmity in the language of the instruction. Instead, Junior limits his claim of error to the contention there was simply no basis in the record for instructing on the natural and probable consequences doctrine. " 'The test for determining whether instructions on a particular theory of guilt are appropriate is whether there is substantial evidence which would support conviction on that theory.' " (*People v. Campbell*, *supra*, 25 Cal.App.4th at p. 408.) As explained in part 1 of the discussion,

ante, the record contains substantial evidence supporting a finding that Junior shared the intent to aid and abet his father, Pacheco, in committing an assault with a deadly weapon on Gonzalez and that the resulting death was a reasonably foreseeable outcome of that assault. "The trial court should grant a prosecutor's request that the jury be instructed on the 'natural and probable consequences' rule only when (1) the record contains substantial evidence that the defendant intended to encourage or assist a confederate in committing a target offense, and (2) the jury could reasonably find that the crime actually committed by the defendant's confederate was a 'natural and probable consequence' of the specifically contemplated target offense." (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 269.) The record establishes that both elements were satisfied below. Accordingly, it was not error for the trial court to give CALCRIM No. 403 as requested by the prosecution.

3. Pacheco's testimony acknowledging he had a parole officer, elicited by the prosecutor during cross-examination, did not result in prejudice warranting reversal.

While it is not clearly expressed, defendants appear to raise a two-fold attack on the testimony elicited from Pacheco that he was on parole. The first argument is the trial court erred in denying their motions for mistrial based on the admission of that testimony. The second is the prosecutor committed intentional misconduct in engaging in the line of questioning that resulted in that testimony. The crux of both arguments, which defendants claim warrants a reversal of their convictions, hinges on the contention that Pacheco's credibility was crucial to the defense. The defense theory was that Gonzalez had been the aggressor and Pacheco had interceded in Gonzalez's attack on Junior to defend him, causing a fatal stab wound with Gonzalez's own knife solely in self-defense. Defendants contend that prejudicing the jury against Pacheco with information he had a criminal record, when the primary evidence was his word against Vasquez's, effectively doomed the defense. We address each argument in turn.

a. The denial of the motion for mistrial.

" ' " 'The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.' " ' [Citation.]" (*People v. Staten, supra,* 24 Cal.4th at p. 466.) The Supreme Court has explained that a motion for mistrial "should be granted only when ' "a party's chances of receiving a fair trial have been irreparably damaged." ' " (*People v. Ayala* (2000) 23 Cal.4th 225, 282, citing *People v. Welch* (1999) 20 Cal.4th 701, 749.) Defendants have failed to show their rights to a fair trial were "irreparably damaged" by the testimony of Pacheco that he had a "parole officer."

During the cross-examination of Pacheco, the prosecutor initiated a line of questioning concerning Pacheco's conduct after the incident of July 27, 2006, ostensibly for the purpose of showing consciousness of guilt and an attempt to evade detection by law enforcement. At the beginning of the exchange, Pacheco explained he had been living with a sister in Monterey Park but after the incident, he went to his "mom's, to [his] other sisters. Everybody lives in the immediate area." He confirmed he was "pretty much" moving around from "place to place." The prosecutor then asked: "You were doing that so the police wouldn't find you, correct?" Pacheco responded: "If I was particularly hiding from the police, I would have left the area." He stated he simply wanted to "spend time with [his] family." The following questions and answers then took place:

"Q Now, you had obligations to let certain people know where you were living at that time, correct?

"A Meaning?

"Q Were there people to whom you had to report any changes of addresses?

"A Yes.

"Q Did you report to those people those changes of address?

"A I hadn't left the area. I wasn't concerned about that.

"Q There were people who you had a legal obligation to tell specifically what homes you were living at, correct?

"A Correct.

"Q But you never notified those people, right?

"A I was still going to my sister's, sir. I don't see what you are saying.

"Q There were serious consequences to you if you didn't report any changes of address, correct?

"A Are you talking about my parole officer?

"Q Well, you had to report to your parole officer where you were living, right?

"A Yes.

"Q And you didn't update -- you didn't let him know where you were, correct?

"A I stayed at my sister's. I spent the nights just a few days, it wasn't like I left town.

"Q After the stabbing you had absconded from parole, right?

"[Defense Counsel]: Objection. Your honor may we approach?

"The Court: Yes."

A brief sidebar conference took place during which counsel for Pacheco moved for mistrial. The court, concerned about the voice level at which the lawyers were speaking, excused the jurors for a recess. Counsel for Junior then joined in the motion for mistrial. After allowing lengthy argument about the motions and soliciting alternative sanctions to be imposed against the prosecutor short of granting a mistrial, the court denied the motions. The court stated there was no likely prejudice given Pacheco's own statements as to drug use and the amount of testimony in the record generally concerning drug possession and use by several of the main individuals involved in the incident. The court further noted that an admonition or instruction could cure any potential harm.

Defendants contend the prosecution case was weak at best and relied almost exclusively on the testimony of Vasquez who exhibited serious memory problems, was admittedly on medications at the time he purportedly saw the fight and had made multiple inconsistent statements concerning what he did or did not witness. Accordingly, the defense argued that Pacheco's credibility was key because it was essentially his word against Vasquez's as to how the fight unfolded and why. The defense further argued the

court had already ruled there would be no admission of any prior offenses by Pacheco, highlighting the bad faith of the prosecutor in continuing to push for further information. Defendants contend that by intentionally pressing Pacheco to disclose the parole officer information, the prosecution indirectly presented evidence Pacheco had a prior criminal record and therefore unfairly impugned his credibility before the jury and violated the court's ruling concerning impeachment evidence pursuant to Evidence Code section 1101.

"There is little doubt exposing a jury to a defendant's prior criminality presents the possibility of prejudicing a defendant's case and rendering suspect the outcome of the trial. [Citations.] [¶] Whether in a given case the erroneous admission of such evidence warrants granting a mistrial or whether the error can be cured by striking the testimony and admonishing the jury rests in the sound discretion of the trial court. [Citation.] ' "A mistrial should be granted if the court is apprised of prejudice that it judges *incurable by admonition or instruction.* [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with *considerable discretion* in ruling on mistrial motions." [Citation.]' " (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1580-1581, italics added.)

The trial court offered a limiting instruction to which both defendants acceded. Special jury instruction No. 7, identified as "defense request—given as requested", provided as follows: "You heard Mr. Pacheco, Sr. testify, truthfully, that he is on parole. The fact that Mr. Pacheco, Sr. is on parole is not evidence. Mr. Pacheco, Sr. was on parole for a simple drug possession charge." In light of this instruction, the jury was not left with the impression that Pacheco was on parole for anything other than a basic drug possession charge. While this information was "prior offense" evidence which the jury could arguably consider in judging Pacheco's credibility negatively, there was already evidence in the record concerning Pacheco's drug use.

In his direct testimony, Pacheco had *volunteered* that on the day of the incident he was in possession of drugs, namely that he had been smoking marijuana. The jury had

also already heard from Vasquez that he had used heroin with Pacheco in the past.[12] Hearing a minimal amount of additional evidence, along with a clarifying instruction, that such drug use on the part of Pacheco had also resulted in a prior arrest could not reasonably have altered the jury's assessment of Pacheco's credibility to such an extent that they could not fairly weigh his testimony when he denied the murder charge and explained that he fought with Gonzalez in self-defense and in defense of his son. (*People v. Bennett* (2009) 45 Cal.4th 577, 612 [it is presumed jury follows limiting instructions and/or heeds admonitions from the court thus avoiding prejudice].) To the extent there was any taint to the jury against Pacheco as a drug user and/or possessor, he had already provided that information to them and the subsequent revelation of a prior arrest for that admitted conduct could not have been materially more damning to his credibility.

A similar passing reference to parole status occurred in *People v. Bolden* (2002) 29 Cal.4th 515, and the Supreme Court affirmed the trial court's denial of the motion for mistrial. There, a police officer testifying for the prosecution as to the circumstances of the defendant's arrest made a statement that he had located an address for the defendant through the "Department of Corrections parole office." (*Id*. at p. 554.) In rejecting the defendant's claim of error on appeal, the Supreme Court explained that "[i]t is doubtful that any reasonable juror would infer from the fleeting reference to a parole office that defendant had served a prison term for a prior felony conviction. The incident was not significant in the context of the entire guilt trial, and the trial court did not abuse its discretion in ruling that defendant's chances of receiving a fair trial had not been irreparably damaged." (*Id*. at p. 555.) The brief reference to parole status here, given the balance of the record and Pacheco's own admissions, was of no greater consequence than in *Bolden*.

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12 The jury was also aware that Vasquez had at least one drug-related conviction as he was incarcerated at the time of his testimony, appeared in prison clothes and admitted to it.

Since the issue before the jury was whether or not a murder or manslaughter had been committed, and not conduct related to mere drug possession, it was well within the court's discretion to deny the motion for mistrial. (*People v. Welch*, *supra*, 20 Cal.4th at p. 750 [evidence showed defendant engaged in six murders, therefore whether or not it was error under Evidence Code section 1101 for jury to have heard defendant was also a drug dealer was "inconsequential" and motion for mistrial properly denied].) Any conceivable prejudice was adequately cured by the special instruction read to the jury.

b. Prosecutorial Misconduct.

Defendants contend the prosecutor *intentionally* elicited the improper parole officer testimony which warrants a reversal of their respective convictions.[13] "A prosecutor's rude and intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' [Citations.] But conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' [Citations.]" (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.) Additionally, our inquiry focuses on the potential injury and prejudice to the defendant which, if found, is not cured by the subjective good faith of the prosecutor. (*People v. Benson* (1990) 52 Cal.3d 754, 793.) There is no showing here that the prosecutor, intentionally or otherwise, engaged in a *pattern of egregious conduct* rendering the trial fundamentally unfair or used *reprehensible* methods to attempt to persuade the jury.

As even defendants concede, it was a proper area of cross-examination for the prosecutor to inquire of Pacheco as to his behavior after the stabbing of Gonzalez. Therefore, the first 10 questions concerning where he was residing after the fight cannot be characterized as misconduct. However, the final three questions went too far,

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13 Pacheco also raised this claim of prosecutorial misconduct in his motion for new trial which was denied.

particularly in light of the fact that Pacheco, by that time, had already admitted to having moved around from house to house—sufficient testimony for the prosecutor to have argued Pacheco was seeking to evade law enforcement after the fight. The trial court expressed its disappointment in the prosecutor for having continued to ask follow-up questions.[14] Nevertheless, the final questions cannot be deemed so egregious or reprehensible as to have rendered the entire trial fundamentally unfair to either Pacheco or Junior. (*People v. Parsons* (1984) 156 Cal.App.3d 1165, 1171 [reasonable probability prosecutorial misconduct prejudiced the defense "focuses on how prejudicial the wrongful evidence is and the weight of the evidence adduced at trial"].) We find no error in the trial court's denial of the motions for mistrial based on prosecutorial misconduct, or in the denial of Pacheco's motion for new trial on the same basis.

Even assuming it was improper for the prosecutor to have pressed this line of questioning, or at least the last three questions of the colloquy, any such misconduct was harmless. Given Pacheco's own admissions of drug use as explained *ante*, it is not reasonably probable that Pacheco or Junior would have obtained a more favorable outcome in the absence of the reference to Pacheco's parole status. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

4. The record reveals no juror misconduct.

Finally, defendants contend the jury was prejudicially tainted by Juror No. 9's disclosure she knew a female spectator associated with the defense and was concerned the woman may have known where she lived. An appellate court independently determines whether there was any substantial likelihood of actual prejudice arising from juror misconduct. (*People v. Harris* (2008) 43 Cal.4th 1269, 1304; *People v. Danks* (2004) 32 Cal.4th 269, 303-304; *People v. Nesler* (1997) 16 Cal.4th 561, 582.) In making that determination, we are mindful that jurors are not " 'automatons. . . . If the [jury] system is to function at all, we must tolerate a certain amount of imperfection short

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14 The court also expressed concern as to why defense counsel had failed to timely interject appropriate objections.

of actual bias.' " (*People v. Danks, supra,* at p. 304.) We find no prejudice warranting reversal on the record before us.

The claim of juror misconduct arises from a note forwarded to the court during deliberations. The note read, in pertinent part, as follows: "Juror #9 has informed us that a female spectator sitting on the Pacheco side is known to Juror #9 . . . they went to high school together. Juror #9 has not seen the spectator in four years. However, Juror #9 fears retaliation in that the spectator has knowledge of where Juror #9 lives. [Juror #9] did not see the spectator until 12/5/08 and 12/8/08. We are ready to submit verdicts for Jr. and Sr. Will this issue compromise our decision?" Defendants urge us to find that Juror No. 9 should have been discharged for misconduct for sharing the information with the entire jury and that Juror No. 9's disclosures tainted the entire jury such that a mistrial should have been granted. We do not agree.

It is of course beyond dispute that defendants were entitled to trial by an impartial jury. " 'An impartial jury is one in which no member has been improperly influenced [citations] and every member is " 'capable and willing to decide the case solely on the evidence before it' " [citations].' [Citation.] . . . ' "[I]t is settled that a conviction cannot stand if even a single juror has been improperly influenced." [Citations.]' [Citations.]" (*People v. Harris, supra*, 43 Cal.4th at p. 1303.) "The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." (*Turner v. Louisiana* (1965) 379 U.S. 466, 472.) As such, the receipt or disclosure of information extrinsic to the record may constitute juror misconduct because it raises the specter of improper influence impacting the impartiality of the jury. (*People v. Mincey* (1992) 2 Cal.4th 408, 467.) This is so even if the jury's receipt of such outside material is inadvertent. (*People v. Nesler, supra* 16 Cal.4th at p. 579; *People v. Harris, supra*, at p. 1303 [a sitting juror's involuntary exposure to events outside the evidence " 'even if not "misconduct" in the perjorative sense' " may require examination for prejudice].)

" '[W]hen misconduct involves the receipt of information from extraneous sources, the effect of such receipt is judged by a review of the entire record, and may be

found to be nonprejudicial. The verdict will be set aside only if there appears a substantial likelihood of juror bias.' " (*People v. Danks*, *supra*, 32 Cal.4th at p. 303; accord, *People v. Mincey*, *supra* 2 Cal.4th at p. 467.) Juror bias may be found in two ways: "(1) if the extraneous material, judged objectively, is so prejudicial in and of itself that it is inherently and substantially likely to have influenced a juror; or (2) even if the information is not 'inherently' prejudicial, if, from the nature of the misconduct and the surrounding circumstances, the court determines that it is substantially likely a juror was 'actually biased' against the defendant. If we find a substantial likelihood that a juror was actually biased, we must set aside the verdict, no matter how convinced we might be that an unbiased jury would have reached the same verdict, because a biased adjudicator is one of the few structural trial defects that compel reversal without application of a harmless error standard." (*People v. Nesler*, *supra*, 16 Cal.4th at pp. 578-579; *People v. Harris*, *supra*, 43 Cal.4th at pp. 1303-1304.)

After discussing the note with counsel, the trial court questioned each juror individually to find out exactly what Juror No. 9 had said and what the jury subsequently discussed as a group before sending out the note. The parties acquiesced to this procedure. "The decision whether to investigate the possibility of juror bias, incompetence, or misconduct rests within the sound discretion of the trial court." (*People v. Burgener* (2003) 29 Cal.4th 833, 878; accord, *People v. Bradford* (1997) 15 Cal.4th 1229, 1351.) Any questioning of the jurors should be as limited as possible so as to protect the sanctity of the jury's deliberations. (*People v. Barber* (2002) 102 Cal.App.4th 145, 150.)

The trial court's inquiry here was appropriately tailored to the circumstances and did not in any way infringe on the jury's deliberative process. The answers provided by the jurors during the court's questioning revealed there was *no inherently prejudicial outside information disclosed* to the jury, despite defendants' argument to the contrary. Juror No. 9 essentially relayed *only* her concern that she knew a woman spectator who had come to court a couple of days with Balderrama, a defense witness. She further stated her concern that the woman might know where she lives or that she might run into

her in the neighborhood. Juror No. 9 may have been anxious only to let the court know she was acquainted with someone who might be associated with the case; or she may have been concerned about the consequences of a defense witness who knew the identity and address of a member of the jury. In either event, Juror No. 9's concern does not constitute juror misconduct arising from the disclosure of "inherently" prejudicial extrinsic material. (*People v. Nesler*, *supra*, 16 Cal.4th at pp. 578-579.)

We also find no error in the court's determination, after talking with each juror and assessing the credibility of their responses, that the jury's discussion about Juror No. 9's concerns over the spectator did not result in the substantial likelihood that any juror had been tainted or had become "actually biased" against defendants. (*People v. Nesler*, *supra*, 16 Cal.4th at pp. 578-579.) The record shows that nine of the 12 jurors stated without hesitation that the disclosure by Juror No. 9 would not affect their decision, while the other three were not directly asked the question but expressed no concerns personal to them. There was no statement from any juror, including Juror No. 9, that the spectator had exhibited any behavior that indicated she had recognized Juror No. 9 or had acted threatening in any way. There was no evidence that any juror had been threatened by anyone associated with the defense. There was no indication by any juror that they were fearful of defendants specifically or thought negatively of them because of the disclosure by Juror No. 9.

As the court noted in its ruling denying the defense motions for mistrial, the jurors' responses revealed they did not feel the disclosure would affect their substantive deliberations and that they were primarily concerned with complying with their obligations to let the judge know that Juror No. 9 had recognized a person potentially associated with the case, since that had been asked of them during voir dire. The court further noted that any fear or concern mentioned during the court's inquiry was merely a generalized concern—similar to that expressed by many jurors about to deliver a verdict in a criminal case. Even when Juror No. 9 was expressly given the option to be excused, she reiterated her desire and ability to remain as a juror and discharge her duties properly.

"[T]o establish juror misconduct, the facts must establish ' "an inability to perform the functions of a juror, and that inability must appear in the record as a *demonstrable reality*." ' [Citations.]" (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1351, italics added.) There is no showing of a "demonstrable reality" that any juror was unable to perform his or her function as a juror, including Juror No. 9, or that any juror was "actually prejudiced" against Pacheco or Junior. As such, we find no error in the court's ruling declining to discharge Juror No. 9 for misconduct or to otherwise discharge the entire jury.

Defendants contend the subsequent conduct of Juror No. 3 establishes there was jury taint of a degree that mandates reversal. Following the court's denial of the defense motions for mistrial, the court was provided another note, this time indicating Juror No. 3 wished to speak with the court in private. Juror No. 3 stated that after having had time to think about the situation over night, he no longer felt comfortable proceeding as a juror based on a generalized fear for his safety. He expressly denied having discussed his thoughts in any way with any other juror. Defendants argue that his change of heart overnight after initially responding, like all of the other jurors, that Juror No. 9's disclosure would not affect him, is unequivocal proof of the level of concern and fear actually discussed by the jurors prior to sending out the note, and that the responses by the other jurors that it would not affect their decision-making should not be credited. The trial court found cause to discharge Juror No. 3 and replaced him, by random draw, with Alternate Juror No. 4. Given that Juror No. 3's newly formed fears about proceeding as a juror were contained, and nothing in the record provides any basis to believe his fears affected the rest of the jury, we find no error in the discharge of Juror No. 3. There is nothing about the limited and private exchange between Juror No. 3, the court and counsel to negate the trial court's prior assessment that the other jurors remained capable and willing to fairly discharge their duties as jurors.

5. Respondent's request to modify the abstract of judgment is properly granted.

Respondent contends the abstract of judgment for Pacheco neglects to include the $20 court security fee imposed at the time of sentencing. A review of the record supports

respondent's argument and Pacheco raises no opposition in his reply brief. The abstract of judgment as to Pacheco should be modified accordingly to correct the clerical error. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) The judgment as to Pacheco is affirmed in all other respects.

DISPOSITION

The judgment as to Michael Louis Pacheco, Jr., is affirmed. The judgment as to Michael Louis Pacheco, Sr., is modified in the following respects: the trial court is directed to prepare a modified abstract of judgment that correctly reflects the court's imposition, on January 23, 2009, of a $20 court security fee pursuant to Penal Code section 1465.8. The trial court is further directed to transmit a certified copy of the modified abstract of judgment to the Department of Corrections and Rehabilitation. The judgment as to Michael Louis Pacheco, Sr., is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GRIMES, J.

We concur:

RUBIN, Acting P. J.

O'CONNELL, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.